Draft Instream Flow Action Plan, draft Version 6c.

Executive Summary

The purpose of this Instream Flow Selection and Adoption Action Plan (ISF Action Plan) is to take actions that result in recommendations for instream flows that support other processes where such flows are established. These actions will include:

- On a drainage scale:
    - providing pertinent information to affected parties and providing opportunities for them to ask questions, identify their needs, and discuss management options for water resource management; and
    - facilitating negotiations to recommend (to both participants of the WRIA 1 Watershed Management Project [WRIA 1 Project] and other processes) a range of flows (including regulatory flows) that support ecological functions of WRIA 1 stream systems.
- On a regional scale, provide recommended flows to:
    - the water quantity, water quality, and fish habitat elements of the WRIA 1 Project;
    - the Federal/Tribal/State claim settlement process (to be accepted or rejected and, if rejected, to return to this process); and
    - the State regulatory process including rule making by Ecology on flow setting.

The ultimate goal is to have water of sufficient quantity and quality to meet the needs of current and future human generations, including the restoration of salmon, steelhead, and trout populations to healthy and harvestable levels and the improvement of habitats on which we collectively rely (SOW March 2000).

The heart of this ISF Action Plan is the drainage scale effort to inform and involve affected parties. This education and involvement effort is followed by a local negotiation process intended to provide instream flow recommendations to the WRIA 1 Project participants and other processes. This effort will be led by the Intergovernmental Instream Flow Working Group. The goal is to negotiate and recommend the range of flows needed to support the ecological functions and the out of stream needs of the various drainages that comprise WRIA 1. The local tribal governments, Lummi Nation and Nooksack Indian Tribe, and Washington State have indicated their interest and willingness to participate in this negotiation process, have agreed to support this effort, and are willing to accept or reject the recommended flows in a Federal/Tribal/State settlement process (pending confirmation from tribal and state policy makers). The Intergovernmental Instream Flow Working Group is working to get agreement from the federal government that it will support this effort and that it too is willing to accept or reject the flow recommendations in a Federal/Tribal/State settlement process.

Tribal water claims have a significant impact on local water management. If a senior federal or tribal water right is left unresolved or is not quantified, the result is uncertainty about the future availability of water for every other water use in WRIA 1. Therefore, it is very important that the WRIA 1 process leads to a resolution of these questions. In order to provide the needed certainty this ISF Action Plan supports a process that resolves tribal water claims. The local tribes, Lummi

Nation and Nooksack Indian Tribe, have various claims with the Federal government including claims for water rights. The Federal government has a defined process for settling tribal claims. The ISF Action Plan is intended to support the local portion of this settlement process by providing flow recommendations that will be accepted or rejected by the Federal/Tribal/State settlement process and, if rejected, returned to the local process for further work.

Because the current instream flows set by Ecology's existing rule in 1986 are expected to require modification, this ISF Action Plan will provide a recommended management strategy including regulatory flows for a new Ecology rule making to set prospective flows for the purpose of processing pending applications for new water rights.

A level of clarity and certainty regarding existing water rights and claims is needed in order to achieve the goals of the WRIA 1 Project to fairly and effectively manage the WRIA 1 water resources. The required level of clarity and certainty regarding who has what water rights does not currently exist in WRIA 1. Existing state statutes, as interpreted by case law, make adjudication in state Superior Court the only process currently available to determine the extent and validity of water rights and claims. However, state Superior Court may not be the most appropriate or efficient venue to achieve a negotiated settlement of federal, tribal, and state water rights and claims. Consequently, since it is anticipated that adjudication may eventually be required to achieve the required level of clarity and certainty regarding water rights, a task envisioned by this ISF Action Plan is that as part of the initial education effort, the Intergovernmental Instream Flow Working Group will garner support for state and federal legislation to reform the adjudication process or provide an alternative process that is more user friendly and effective. The state Attorney General's office is currently working on a reform recommendation. Whatever the outcome of the reform effort, the timing and handling of the needed local adjudication will be worked out in the drainage scale negotiations as part of the initial outreach and information sharing effort. A further effort envisioned by this ISF Action Plan, that may require legislative change, is to create a way for currently unpermitted water users to participate in a meaningful way in the goals of this Action Plan and ultimate adjudication. Under the current law unpermitted water users do not have standing in an adjudication.

It is understood that this ISF Action Plan is part of the WRIA 1 Project and is intended to integrate with the other components of the WRIA 1 Project (i.e., water quality, water quantity, instream flow, and fish habitat). To that end, flow recommendations, flow management strategies, technical work, and the adoption process for flow recommendations will support the other components of the WRIA 1 Project and, upon conclusion of this ISF Action Plan, they will be incorporated into the WRIA 1 Project management process.

Approvals of the work products of this ISF Action Plan start at the drainage level and continue with the Joint Board and Planning Unit. Ultimately, the approval process is expected to include federal, tribal, and state legislative actions and/or court decrees in order to make the results of the process binding on all water users and provide the needed certainty which will serve as the foundation for future water resource management decisions in WRIA 1.

A substantial commitment of time and money and the political will to carry it through to a viable conclusion is required to achieve the desired results of this ISF Action Plan.

This proposed ISF Action Plan is undergoing policy and legal review by the Joint Board, State, and Small City representatives. This proposed Action Plan is being distributed for comments and further definition of the roles and responsibilities of the Project participants.

The following document provides more details and context for this proposed ISF Action Plan.

I. Introduction

In response to Chapter 90.82 RCW, the Water Resources Inventory Area No. 1 (WRIA 1) Watershed Management Project was initiated in 1998 by the City of Bellingham, Whatcom County, PUD No. 1 of Whatcom County, the Lummi Nation, and the Nooksack Indian Tribe. Substantial steps have been taken to engage the general population in the watershed planning and implementation project. The active participants in the Project are: a Planning Unit, comprised of 18 water interests and governmental caucuses; an inter-governmental Staff Team; six technical teams; and a Joint Board. More descriptive information about the WRIA 1 Watershed Management Project can be found at the Project's website (http://www.wria1project.wsu.edu).

The overall goal of the WRIA 1 Watershed Management Project is to have water of sufficient quantity and quality to meet the needs of current and future human generations, including the restoration of salmon, steelhead, and trout populations to healthy and harvestable levels and the improvement of habitats on which we collectively rely (March 2000 SOW). Water quantity, water quality, instream flows, fish habitat and the interrelationship of these elements are being addressed as part of the project. This ISF Action Plan is focused on the instream flow element of the WRIA 1 Project – specifically, the Action Plan will be used to select, achieve, adopt, and recommend instream flow levels throughout WRIA 1 for enforcement through other processes. This Action Plan builds on the technical work being conducted as part of the WRIA 1 Project and a May 2002 symposium on potential methods to recommend and adopt instream flows.

The parties recognize that final agreement is more likely if the parties can freely discuss alternatives and hypotheticals without prejudice to positions they may take in legal proceedings. Therefore, no discussion, proposal, plan, agreement, (other than a formally adopted plan or agreement) offer of compromise, proposed agreement, concession, statement, material, or documents whether oral, written, or in electronic or other format (herein the "protected material"), made or prepared by the parties or their authorized agents in furtherance of the planning process envisioned by this agreement shall be offered into evidence against the party providing the "protected material" in any legal or administrative proceeding. Protected material originating from the Lummi Nation shall not be offered into evidence in any legal or administrative proceeding, regardless of whether the Lummi Nation is a party to that proceeding. Reports and data from the original studies conducted by or on behalf of the Planning Unit are public information.

In Washington statutes RCW 90.22.020 and RCW 90.54.020(3)(a)), the term "instream flow" is defined as the minimum amount of water flowing through a natural stream course that will, with reasonable confidence, protect and preserve instream resources at healthy and sustaining levels. Statutorily protected instream resources include fish (in all life stages), wildlife, aesthetics,

recreation, water quality, navigation, and other environmental values. Environmental values may include recruitment of fresh water to the estuaries, riparian vegetation, floodplain wetlands, and maintenance of channel geomorphology. It is noted that hydropower and waste assimilation are not listed as an instream resource in either Chapters 90.22 or 90.54 RCW of state law. Federal Clean Water Act (CWA)(40 CFR 131.10) prohibits the state from adopting "waste assimilation" as a designated use. State law also requires that the instream flows provide adequate waters for non-feedlot related riparian stockwatering that does not result in extraordinary waste of water (RCW 90.22.040). Water requirements sufficient to maintain all of these instream values at an acceptable level are the "instream flow requirements." (RCW 90.22, 90.54.020(3)(a), USFWS 1993).

The current instream flow requirements for WRIA 1 are specified in Chapter 173.501 WAC. In establishing instream flow rules, the Washington State Department of Ecology (Ecology) is required by RCW 90.03.247 to consult with the Washington State Department of Agriculture and Office of Community Development, as well as Federally recognized Indian Tribes and Nations. The WRIA 1 rule established in 1986 can be found online at www.ecy.wa.gov/lawsrules/ecywac.html#wr.

An intergovernmental working group was tasked with developing a draft action plan that recommends an approach for selecting, achieving, adopting and enforcing instream flow levels throughout WRIA 1. This draft Action Plan is being submitted to the Planning Unit, Staff Team, technical teams, and Joint Board for review, comment, completion, and ultimate approval and implementation. The current draft of the ISF Action Plan will be used as a guideline to implement Instream Flow Pilot Negotiations within WRIA 1. The information learned in the Pilot Negotiation process will be used to modify the ISF Action Plan over time. As will become apparent, due to the interrelationship of water quantity, water quality, instream flow, and fish habitat, implementation of this Action Plan is dependent on the technical studies underway in all of the WRIA 1 Project elements.

The working group that prepared this draft Action Plan were: Clare Fogelsong (City of Bellingham), Bruce Roll and John Thompson (Whatcom County), Tom Anderson and Rebecca Schlotterback (PUD No.1), Leroy Deardorff and Jeremy Freimund (Lummi Nation), Bob Kelly and Llyn Doremus (Nooksack Indian Tribe), Tom Laurie and Jim Bucknell (Ecology), and Bill Verwolf (Small Cities). The working group meetings were facilitated and summarized by Mary Dumas and Rob Kelly (Resolution Services).

Including this introduction, this Action Plan is comprised of eight sections and two appendices. The Action Plan sections are:

- Section I introduction
- Section II lists the criteria used to evaluate the potential success of various approaches to selecting and adopting instream flow levels.
- Section III presents an overview of the recommended process and participants.
- Section IV presents the Recommended Instream Flow *Selection* Action Plan
- Section V presents the Recommended Instream Flow *Achievement* Action Plan
- Section VI presents the Recommended Instream Flow *Adoption* Action Plan.
- Section VII presents the Recommended Instream Flow *Enforcement* Action Plan
- Section VIII presents the Instream Flow *Implementation and Funding* Action Plan

The two appendices to this Action Plan are:

Appendix I - Definition of Terms

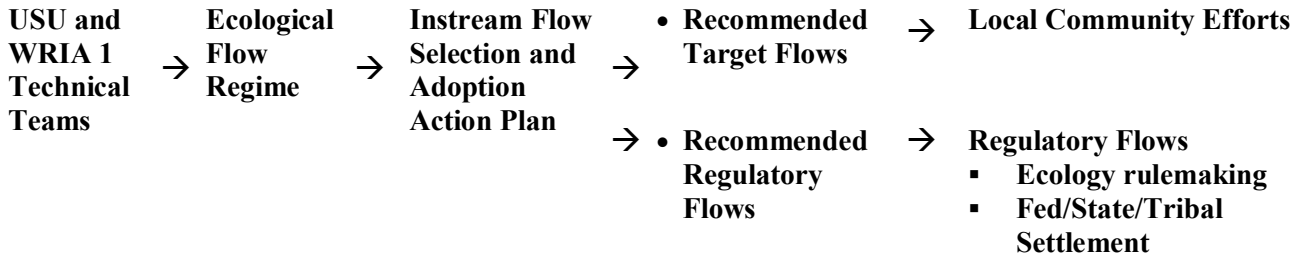
Appendix II - Federal Reserved Water Rights- The Negotiated Settlement Option (IIFWG, Nov 5, 2003)

A list of definitions used in the development of this Instream Flow Action Plan has been included in Appendix I to function as a reference in reviewing this document. It also reflects a common understanding among the authors of the terms used. Various terms describing stream flow are used throughout this Plan. The distinctions and relationships between these stream flow terms are described below. The full definitions of italicized terms are in Appendix I.

> *Ecological flow regimes* for each stream will be developed using best available science. Ecological flow regimes are made up of five functional flow components: valley maintenance, riparian maintenance, channel maintenance, fisheries baseflow, and water quality maintenance flow. The ecological flow regime is the technical product of the work currently being conducted by Utah State University (USU) and the WRIA 1 technical teams.
>
> *Target flows* are achievable and include consideration of instream and out of stream needs. Target flows will be developed locally by the Intergovernmental Instream Flow Working Group (IIFWG –see section "Participant Description and Summary of Roles") for *each* of the ecological flow components. Target flows will be the recommended goals that will come out of local negotiations and are the flows the community agrees to try to achieve. It is noted that the target flow may or may not be the same as the recommended regulatory flow regime.
>
> *Regulatory flows* will be developed locally by the Intergovernmental Instream Flow Working Group (IIFWG –see section "Participant Description and Summary of Roles") for *each* of the ecological flow components. WRIA 1 approved regulatory flows based on an agreed-to management strategy will be the recommended regulatory flow regime. The recommended regulatory flows will be submitted to: (a) Ecology for the use in the state rulemaking process to revise the current *state regulatory instream flows* for WRIA 1 Chapter 173-501WAC, and (b) the Federal/Tribal/State settlement process and may be used by a judge and/or legislative body for consideration and adoption through a consent decree and/or Federal and State legislation. The result of these two adoption processes will establish the final regulatory flows.

State and/or Federal regulatory instream flows may be different than locally recommended flows if the WRIA 1 Planning Unit and/or the Joint Board fail to reach agreement on recommended flows and do not pass on a recommendation to Ecology and the Federal/Tribal/State settlement process. Ecology or the settlement process may then undertake rule making or court or legislative action to change existing state regulatory flows. Figure 1 provides a summary of the overall selection and adoption process and how each of these flow terms are used.

Figure 1.



II. Criteria for Success

The working group concluded that to be successful, the action plan for *selecting* the flows to recommend and adopt must meet agreed upon criteria. The working group agreed that the approach to selecting target instream flows to recommend must:

- Conform to the Federal and State guidelines, statutory requirements, and other legal requirements for instream flows (as described in the Introduction)
- Be compatible with the goals of the WRIA 1 Project and achieve the goals of the ISF Action Plan
- Be an approach that all parties are willing to accept
- Be based on the best available science and a credible, scientific analysis of WRIA 1 instream and out-of-stream water users' proportionate impacts on flows, water quality, and salmonid life cycle and habitat use at a specific river or tributary reach
- Include target flows that are sufficient to achieve specific healthy and sustainable fish populations at all life stages and meet Endangered Species Act (ESA) obligations, but also reflect the limitations posed by seasonal/annual variability in hydrologic and climate conditions. That is, target flows provide conditions conducive to viability of specific fish species and life stages in a variety of hydrologic conditions (e.g., the inter-annual variation in water availability resulting from annual variations in precipitation)
- Meet all water needs to the greatest degree possible, including reconciling the effects of meeting instream fish flow targets with legal, existing, and projected out-of stream uses and needs.
- Allow for maintaining a viable economy in WRIA 1 to the maximum extent practicable
- Recommend target flows that are physically and financially achievable to the maximum extent practicable consistent within legal requirements.

Similarly, the working group concluded that to be successful, the action plan for *adopting* instream flows must meet the following criteria:

- Provide reasonable certainty for both instream and out of stream users that water will be there for future operations and other related factors. (This will require keeping adequate records of use and maintaining water right records in a manner to facilitate enforcement of water law. The use of adjudication for existing water rights will be applied as negotiated.).

- Defines a clear process of what is going to happen and who is involved.
- Contributes to salmon recovery and also meets the requirements of the Endangered Species Act (ESA).
- Meets any applicable requirements of the Federal Clean Water Act (CWA).
- Includes consideration of competing uses. (Note: By definition, recommended target flows include consideration of out of stream uses.)
- Be acceptable to all parties.
- Have adaptability and flexibility to account for issues beyond local control such as climate, new information/ideas, changed factual circumstances, and important legal developments.
- Recognize existing statutory and legal obligations (e.g., public health and safety and treaties between the United States and Indian Tribes).

The working group acknowledges that providing for finality and certainty may limit the extent that adaptive management can be incorporated as an approach for achieving adequate flows for all uses.

III. Process Overview and Participants

The overall process involves four sub processes (instream flow selection, achievement, adoption, and recommendation to other processes that achieve enforcement) that are sequenced, but also overlapping in time, as summarized in Figure 2. Two processes that occur outside the WRIA 1 Watershed Management Project, 1) the Federal/Tribal/State settlement process, and 2) rule making by Ecology, are included in this ISF Action Plan for completeness and clarity.

To better define and test this ISF Action Plan, the Plan will be implemented in phases. The first phase will be pilot project implementation of this Plan, which will start during 2004. This ISF Action Plan may be revised in the future based on the results of these negotiations and any proposed changes will be brought to the Joint Board and Planning Unit for approval.

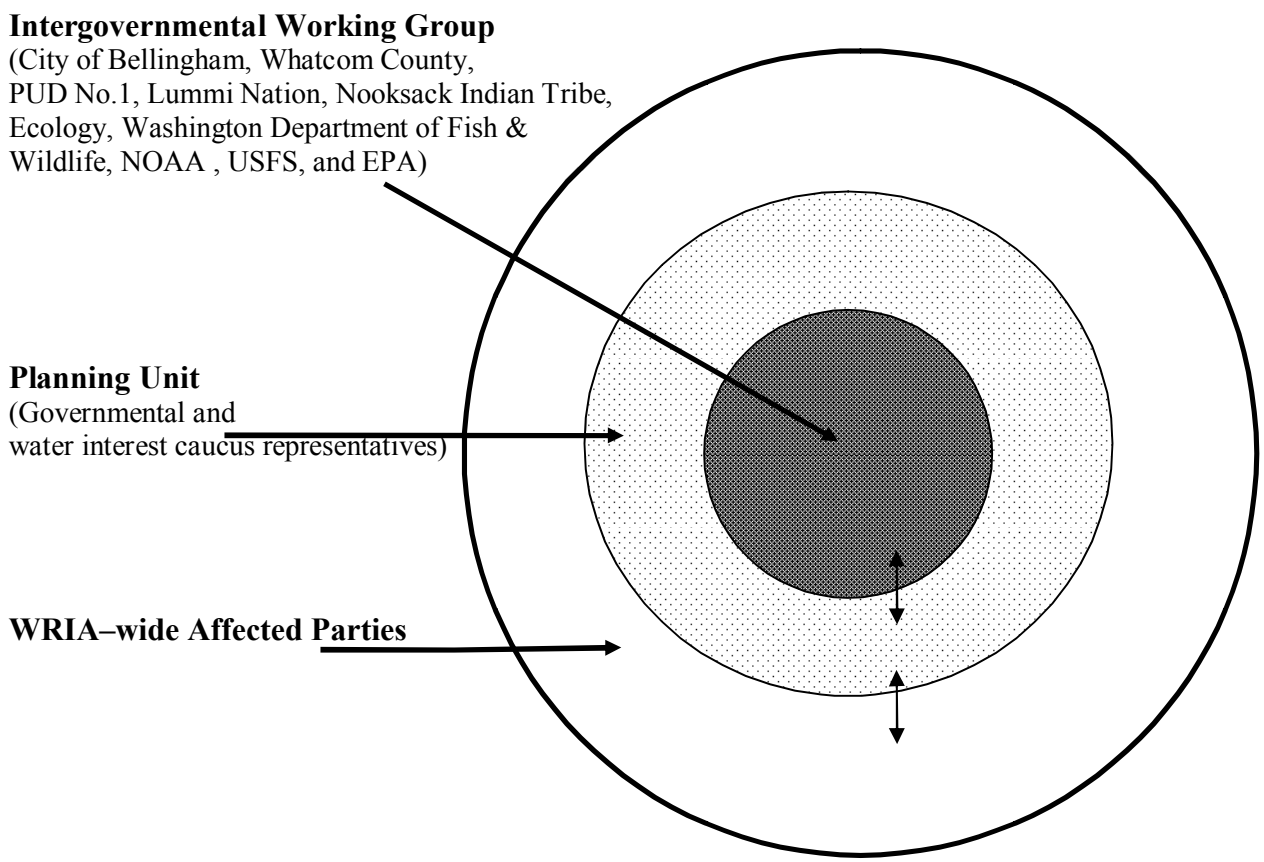
The working group agrees that all affected parties need to be given ample opportunity to express their views and must have opportunities to be represented in the processes to select, achieve, adopt, and recommend instream flows. Further they must understand how flows will be enforced. To accomplish this overall goal, the "concentric circle" approach described by Michael Mirande and included in the *Instream Flow Selection Methodology Symposium Proceedings* (WRIA 1, May 2002) will be applied – particularly to the *selection* of target and regulatory flows for recommendation. The "concentric circle" approach is designed to give everyone that needs to be involved an opportunity to participate, as depicted in Figure 3. This decision making approach works with each interested and affected party in succession. Discussions may repeat or iterate back through the succession as changes are made or new information is obtained. There will be significant effort put into information sharing and involvement of affected parties. For example, the Intergovernmental Instream Flow Working Group (IIFWG defined below) will develop a set of initial ecological flows for a particular drainage or logical aggregation of drainages. Then the IIFWG will organize a series of workshops with the affected parties in each drainage or logical aggregation of drainages to discuss flow recommendations. The participating affected parties and the IIFWG will work together to determine the ability of each drainage or aggregation to meet the flows, identify problems and solutions, and to determine an appropriate management strategy.

314 **Figure 2. The general sequencing/overlapping of the four subprocesses**
315

Selection	***Achievement***	***Adoption***	***Enforcement***
Steps Inside the WRIA Project 2514 Process and Implementation			
Decide where to start and how big an area. Decide whether to support request for Federal involvement at beginning of process or delay involvement. Decide timing of adjudication request and stay.			
Initial target flows developed	*Initial target flow discussions and contracts with affected parties by drainage*		*Water user education*
Initial target flows converted to target flows through interaction with affected parties			*Water user education*
Target flows recommended to PU for approval	*Flow achievement discussions with affected parties*	*PU considers and conducts public workshop on recommended target flows Need to check RCW 90.82 to make sure the PU has authority to conduct hearings. It may be the lead entity?*	*Water user education*
	Target flow contracts negotiated and signed		*Water user education*
	Develop management strategies	*WRIA 1 Watershed Management Plan v2 includes flows recommended for Ecology rule making and Federal settlement process*	*Begin compliance and enforcement on users without valid state water rights target flow contracts*
Steps Outside the WRIA Project 2514 Process and Implementation			
Request Federal Involvement. Initiate formal negotiations between State, Federal and Tribal governments	*Contracts, consensual agreements leading to formal settlement agreement*	*Ecology rule making to adopt recommended instream flows with priority date that affect new users. Continue a negotiated settlement option with Lummi Nation and Nooksack Tribe to end with a consent decree.*	*Proceed with adjudication.*

316
317

Figure 3. Step 2 Initial Flow Selection Representation & Step 3 Seek Agreement on Flow Recommendations Diagram



During Joint Board and Planning Unit meetings, these efforts will be reviewed. Any changes proposed by the Joint Board and Planning Unit will be taken back for discussion with the affected parties in the drainages.

When all of the drainages have recommended target and regulatory flow regimes, those recommendations will be evaluated by the IIFWG for any conflicts and inconsistencies and a set of WRIA-wide recommended target and regulatory flows will be presented to the Joint Board and Planning Unit. The Joint Board, IIFWG, and the Planning Unit will conduct a public workshop. Then the Joint Board and Planning Unit will make decisions on approving the WRIA-wide target and regulatory flows and, based on a management strategy, recommend target and regulatory flows to the Federal/Tribal/State settlement process and to Ecology for state regulatory instream flow rule making. Formal adoption of flows will occur through the Joint Board and Planning Unit, State rulemaking, negotiated settlement, Federal and/or State legislation, and a federal court consent decree, or a combination of the above.

Participant Descriptions and Summary of Roles

Joint Board. The Joint Board is comprised of the administrative decision makers of the WRIA 1 "Initiating Governments". The Initiating Governments are the Lummi Nation, the Nooksack Indian Tribe, Whatcom County, City of Bellingham, and the Whatcom County Public Utility District No.1.

Intergovernmental Instream Flow Working Group (IIFWG) – The IIFWG is a subset of the WRIA 1 Watershed Management Project participants. Members are: City of Bellingham, Whatcom County, PUD No. 1 of Whatcom County, the Lummi Nation, Nooksack Indian Tribe, a representative for the Small Cities Caucus, and the Department of Ecology. The Washington Department of Fish and Wildlife, NOAA Fisheries, U.S. Fish and Wildlife Service, U.S. Forest Service, and the Environmental Protection Agency will also be asked to review the flow recommendations and will be asked to participate in the IIFWG. The IIFWG will propose WRIA 1-wide instream flow goals (to be approved by the Joint Board and Planning Unit), develop initial flow recommendations, recommend flows to the Joint Board and Planning Unit for approval, and participate in the Federal/Tribal/State settlement process. Ecology also conducts formal state regulatory instream flow rule making.

Planning Unit - The WRIA 1 Planning Unit as currently constituted will continue as described in the Implementation Plan. Planning Unit members will approve WRIA-wide instream flow goals, can participate in drainage level workshops on recommended flows where their constituents have interests, will review and approve flows recommended by IIFWG, and approve WRIA 1 Watershed Management Plans which include implementation and management option strategies.

Affected Parties - In each drainage, affected parties are the property owners, water right document holders (certificate, permit, application, claim), and the Planning Unit Caucuses. Affected parties are encouraged to participate in the preparation of the flow recommendations and identification of strategies for achievement. They can also participate in information sharing workshops on, this Plan, water laws, and management options and participate in Ecology's formal state regulatory flow rule making process, adjudicatory court action, and/or legislation.

Federal Negotiating Team – A Federal Negotiating Team is required for the Federal/Tribal/ State settlement process. The Intergovernmental Working Group, the Joint Board, and the Planning Unit will consider supporting expanding the geographic scope of the existing Federal Negotiating Team assigned to the Lummi Reservation water rights negotiations. The Department of Interior will be requested to add representatives from the U.S. Fish and Wildlife Services, NOAA Fisheries, the Environmental Protection Agency, and the U.S. Forest Service to the existing Team that has representatives from the Bureau of Indian Affairs, the Bureau of Reclamation, and the Solicitor's Office. There is more information in Appendix II.

Other Participants – In establishing instream flow rules, Ecology is required by RCW 90.03.247 to consult with the Washington State Department of Agriculture and Office of Community Development. In addition, because of the interrelationship of watersheds and the overlap of usual and accustomed fishing areas, Ecology will consult with all affected Indian tribes whose usual and accustomed grounds and stations include WRIA 1. Parties that are not otherwise legally bound to the process would also participate.

IV. Recommended Instream Flow *Selection* Action Plan

The proposed approach to identifying the instream flow requirements (as defined in Appendix I) begins with an effort to inform and involve affected parties while seeking agreement between the Intergovernmental Instream Flow Working Group (IIFWG) members on initial flow recommendations. The rationale for using the IIFWG to make the initial recommendations for target flows is the following:

- To reduce expenses and effort, a collaborative approach will be used to reach agreement. For practical reasons, cost and efficiency, the number of members of this group are limited.
- Representative governments have the ability to direct technical and legal resources to ensure that recommended flows meet the criteria described previously.
- Agreement among the IIFWG members is critical as they are all in a position to veto an outcome they cannot accept.

The following four-step approach to selecting instream flows is proposed: 1) foundation development, 2) initial flow recommendation development, 3) seek acceptance of affected parties, 4) recommend flows to the Joint Board and Planning Unit that at least include target and regulatory flows. Pursuant to the selection criteria, there must be possible physical and financial means for achieving the recommended target flows. Possible strategies will be explored to ensure achievement is possible but final approaches used to achieve flows may be left up to the implementing entities.

Step 1 Foundation Development: The IIFWG will recommend to the Joint Board and Planning Unit for approval where geographically to start and how big of drainage units (one drainage or several aggregated drainages) to include in this ISF Action Plan process. This process will ultimately be completed throughout WRIA 1. Multiple teams may be established to work in different areas of WRIA 1 depending on available funding.

The IIFWG will propose WRIA-wide instream flow goals (to be approved by the Joint board and Planning Unit). Then the IIFWG will compile technical information for the first drainage unit and conduct workshops for affected parties in the drainage unit to ensure that all of the affected parties within the drainage unit are identified and informed about the issues listed below. It is anticipated that this will involve the following affected parties:

- Water right document holders (certificate, permit, application, claim)
- Water users
- Property owners
- Planning Unit Caucuses

This foundation development step will require a significant public involvement and information exchange effort on the following topics:

- WRIA-wide instream flow goals and overview of flow selection, achievement, adoption, and enforcement process
- Ecological flow regime
- Other instream uses
- Current and future out-of-stream uses
- Hydrologic impacts of drainage activities
- Water quality
- Hydraulic continuity
- Groundwater availability
    - ASR potential
- Surface water storage potential
- Wetlands restoration, protection, and mitigation banking
- Concept of initial target flows and target flows
- Concept of flow contracts
- Endangered Species Act
- Clean Water Act
- Potential processes to resolve extent of existing rights and claims, including adjudication
- Federal involvement, settlement agreements, and consent decrees
- Tribal claims
- Enforcement options
- Conservation
- Reclamation and Reuse
- Washington State Water Law

This effort is focused on ensuring that the information needed to make knowledge-based decisions is available to all parties for consideration in the flow selection process. The information from the technical analysis will provide the foundation for discussions at the drainage level. It is expected to include modeled hydrographs for the drainage unit under historical, current, and future use patterns for wet, average, and dry circumstances; estimated current and future out of stream needs; current water claims, applications, permits and certificates; the range of ecological flows desired and a description of the WRIA-wide instream flow situation.

As the discussion in the drainage unit expands it will include current and future out of stream water needs. This gets tied to a discussion of existing rights and claims. A level of clarity and certainty regarding existing water rights and claims is needed. The required level of clarity and certainty regarding who has what water rights does not currently exist in many drainage units. Existing state statutes, as interpreted by case law, make adjudication in state Superior Court the only process currently available to determine the extent and validity of water rights and claims. The existing adjudication process allows for a range of geographic scales, from multiple WRIAs to a drainage level. However, the use of state Superior Court and the existing adjudication process may not be the most appropriate or efficient venue to achieve a negotiated settlement of existing state water rights and claims. It is anticipated that either local or basin wide adjudication will eventually be required to achieve the required level of clarity and certainty regarding existing water rights and claims. The IIFWG will develop recommendations for policy makers regarding state and federal

legislation to reform the adjudication process or provide an alternative process that is more user friendly and effective. The state Attorney General's office has developed reform recommendations; new legislation may be introduced in 2004. What ever the outcome of the reform effort the timing and handling of the needed local adjudication will be worked out in the drainage scale negotiations.

Federal reserved water claims including Tribal water claims have a significant impact on local water management. If a senior federal or tribal water right is left unresolved, or is not quantified, the result is uncertainty about the future availability of water for every other water use. Therefore, it is very important that the WRIA 1 process leads to a resolution of these questions. The local tribes in Whatcom County have stated a desire to quantify their claims. The local tribes have various claims with the Federal government including claims for water rights. The Federal government has a defined process for settling tribal claims. The local tribes preferred method is a Federal/Tribal/State settlement process as outlined in Appendix II. The local tribes and the State have agreed that within a Federal/Tribal/State settlement process they would accept or reject the flow recommendation from this process and if they are rejected refer them back to this process for further work (pending policy and legal review). The ISF Action Plan is intended to support the local portion of this settlement process by providing flow recommendations. The IIFWG will, as part of the discussions in the drainage unit, hold discussions about the pros and cons of a Federal/Tribal/State settlement process. The IIFWG will solicit public input to determine the level of support for recommending this approach and recommendations will be forwarded to the Joint Board and Planning Unit for action.

A further effort envisioned by this ISF Action Plan, that may require legislative change, is to create a way for immediate improvements to flows and habitat to occur and for currently unpermitted water users to participate in a meaningful way in the goals of this Action Plan and ultimate regulatory processes. This is discussed in more detail in Section V.

Step 2 Initial Flow Recommendation Development: The IIFWG will develop the initial flow recommendations for the drainage unit. This development step is to identify flow levels that state, federal, tribal, and local government representatives will accept. Physically and financially practicable strategies to achieve flows will be identified. This is to ensure that the recommended flows are achievable within the context of the selection criteria identified previously. Several approaches may be used by the IIFWG to arrive at the recommended flows, and the recommended flows will be evaluated in terms of the criteria described previously. The initial flow recommendation development will generally proceed as follows:

A. Utah State University's technical studies will be used to identify the instream flow requirements of an ecological flow regime for the drainage unit. The Utah State University's modeling effort will provide hydrographs for historic, current, and future scenarios under wet, average, and dry conditions. Those studies will also define a quantitative relationship between instream flow and fish habitat quantity and quality for the drainage unit.

B. An estimate of current and future uses in the drainage unit will be prepared along with an analysis of existing water right claims, permits, certificates, and applications. This will include uses of water from wells exempt from permitting under RCW 90.44.050.

C. The surface water model predictions of a historic conditions instream flow hydrograph for each drainage unit will be developed for wet, average, and dry years to evaluate water availability during each of these weather conditions. An analysis will be conducted to compare this "natural" water availability to the estimated current and future needs as well as the existing claims permits and certificates. This analysis will determine the magnitude, duration, timing, and frequency of events where water is available for instream and out-of-stream uses. This analysis may include evaluating sequential wet and/or dry years. Also modeling of historic flows will provide information on human impact to flows. Land use changes by humans can have significant effects on the timing and size of flow events. Understanding how changes have affected flows and habitat availability will provide direction on how to achieve desired outcomes.

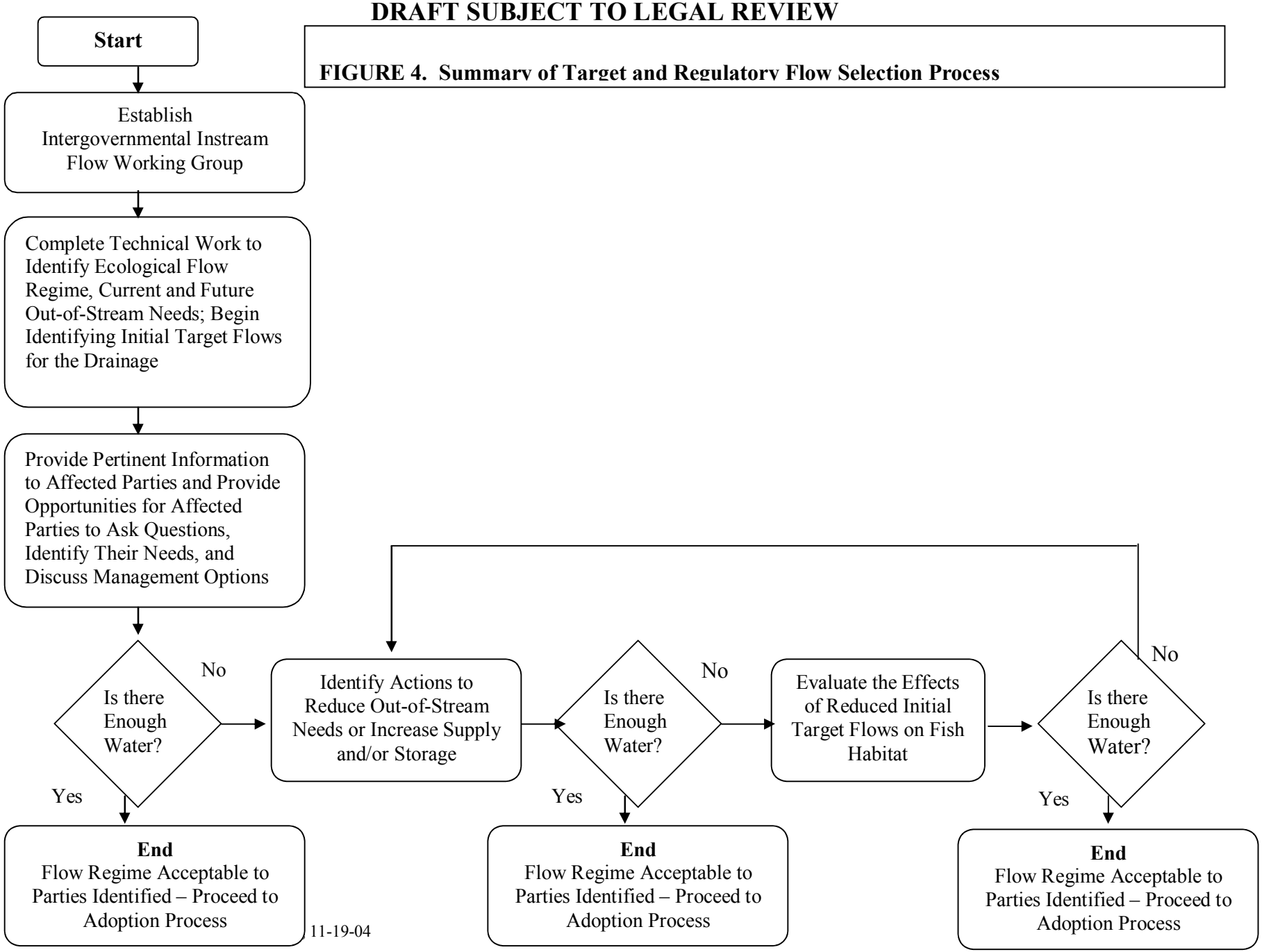
D. The results of the WRIA 1 ground water quantity modeling effort will be used to assist in the assessment of the impact of ground water use upon stream flow and habitat, and has the potential to be used to evaluate augmentation of streamflow and habitat, and evaluate other ground to surface water and habitat options that might be useful in development of instream flow recommendations.

E. When the IIFWG reaches consensus on proposed flows and practicable management strategies, then initial flows for recommendation have been identified for a drainage unit and the process can move to step 3.

The IIFWG will use the process summarized in Figure 4 in both Step 2 and Step 3.

DRAFT SUBJECT TO LEGAL REVIEW

FIGURE 4. Summary of Target and Regulatory Flow Selection Process



Step 3. Seek Agreement on Flow Recommendations: Once the IIFWG has agreed to an initial flow recommendation, it will present its initial flow recommendation, selection methodology, and justification to the affected parties for feedback and discussion at a workshop in the drainage. These flow recommendations will include information on the full range of ecological flows and will specifically include target flows, regulatory flows to be set by Ecology, and regulatory fish flows for the Federal/Tribal/State settlement process. For drainage units where the analysis indicate there is not sufficient water to meet instream and out-of-stream needs, the IIFWG and the participating affected parties will first analyze the economic and other impacts of decreased water supply for out of stream uses and then look for alternatives to increase supply such as conservation, water reclamation and reuse, surface or ground water storage, and importation of water. The cost impacts of these alternatives will be analyzed. If this analysis determines that both out-of-stream and instream uses can be met in a manner consistent with the selection criteria identified above, the flow regime is ready for adoption. If not, the effects of lower than recommended instream flows on fish habitat quantity and quality will be analyzed and the potential alternatives for enhancing instream flow or habitat will be identified including storage and ground water augmentation. The economics of all options will be evaluated and will include the consideration of environmental factors. This process, which will be iterated until acceptable flows and possible strategies are identified, is summarized in Figure 4.

In some drainage units the required level of clarity and certainty regarding who has what water rights does not currently exist. This makes the task of balancing available water with uses and rights impossible. Existing state statutes, as interpreted by case law, make adjudication in state Superior Court the only process currently available to determine the extent and validity of water rights and claims. As part of the process of iterating the instream and out of stream needs the IIFWG and the participating affected parties will analyze the available methods (including adjudication both local and basin wide) for determining the size and extent of existing rights and claims and will agree on what process will be applied to the drainage unit in question.

Further as part of the iteration process the IIFWG and the participating affected parties will discuss management strategies for all aspects of water management including flow achievement, compliance with environmental laws, flow contracts, and the long term enforcement options. The IIFWG and participating affected parties will prepare a recommendation on management strategies to be forwarded to the Joint Board and Planning Unit to be incorporated into the WRIA 1 implementation process.

Once agreement is reached, the next step is for the recommended flows for the drainage unit to be forwarded to the Joint Board and Planning Unit for approval. It is anticipated that in some cases the process for reaching agreement with the Joint Board and/or Planning Unit will include iterations on the flow recommendations with the IIFWG and participating affected parties.

Step 4. Recommend Flows: Due to the interrelationships and cumulative nature of stream flow within a system of drainages, initial flow recommendations will first be developed for each drainage. After that the flows for each drainage within a system will be identified and integrated, then the combined flow recommendations for the system will be recommended to the Joint Board and Planning Unit. After all WRIA 1 flow recommendations have been developed and approved by the Joint Board and Planning Unit, the IIFWG will review the compiled set of flows WRIA-wide

for any inconsistencies and contradictions. The IIFWG will then present a final complete set of flow recommendations to the Joint Board and Planning Unit for approval. A public hearing will be held on the recommended full set of flows. Then the Joint Board and Planning Unit will consider the comments from the public hearing and make a decision on the recommended flows. This set of approved flow recommendations will then be incorporated into the next version of the WRIA 1 Watershed Management Plan. If the agreed to management strategy requires Ecology to change current regulatory flows, the Planning Unit will provide direction to Ecology to proceed with rulemaking.

These instream flow recommendations would also be forwarded to the Federal/Tribal/State settlement negotiations for acceptance or rejection. If the flow recommendations are rejected, the process would iterate until acceptable flow recommendations are achieved or an impasse is declared in which case the process could default to an adjudicative court process.

If the IIFWG, Joint Board, and Planning Unit cannot agree on the recommended flows, two scenarios are possible:

- Evaluate the possibility of reaching agreement and if agreement looks likely, go back to discussion and make changes to flows or out of stream demands until agreement is reached.

- Notify Ecology that agreement on recommended flows cannot be reached. Ecology could then go to rule making on its own. Alternatively, if an adjudication has been started the adjudicating court could be notified that an agreement could not be reached and that a judicial determination is requested.

If the Joint Board and Planning Unit decision is to request no change to current state regulatory flows in Chapter 173-501 WAC, then the instream flow recommendation process under Watershed Planning would end. The existing adopted flows would then be used in other WRIA 1 Project work as needed.

Potentially affected parties who chose to not participate in the initial flow review process will have an opportunity to participate in the formal Ecology rule making, adjudication court case when started, and flow adoption stage that follows. It is anticipated that in some cases private parties or some water resource interest groups may not be able to accept a given flow recommendation. It should be noted that these flow recommendations will be subject to further public and judicial review in the adoption process.

V. Recommended Instream Flow *Achievement* Action Plan

Because a regulatory flow adoption process may require agreements that take significant time due to associated legal processes, it is recommended that flow achievement strategies be developed and implemented early on that are not dependent on the regulatory flow adoption process. One possible approach that has been proposed is the concept of consensual agreements that result in habitat improvement in the short term and participation of unpermitted water users in the negotiation process. These consensual agreements, which may include other provisions, are being referred to as flow contracts.

Affected parties in the drainage will also have the opportunity to discuss additional strategies for achieving target flows in their drainage. The WRIA 1 implementation process will provide assistance as needed or if there are no willing implementers the WRIA 1 Management group (as defined in the Implementation Strategy) will take on the task.

In addition, the flow achievement process will evaluate strategies such as:

- Monitoring the percentage of available habitat supported by the recommended target flows
- Dedicating a use maximum and reserving the rest for fish in certain reaches (upside down water rights)
- Trading habitat and wetland enhancements for out-of-stream uses
- Stream augmentation by ground water or seasonal surface water storage
- Changing surface water withdrawals to ground water sources
- Drainage modifications
- Irrigation scheduling, especially of direct surface water withdrawals
- Conservation and reuse
- Land use and zoning changes
- Other management options such as interbasin transfers and water marketing

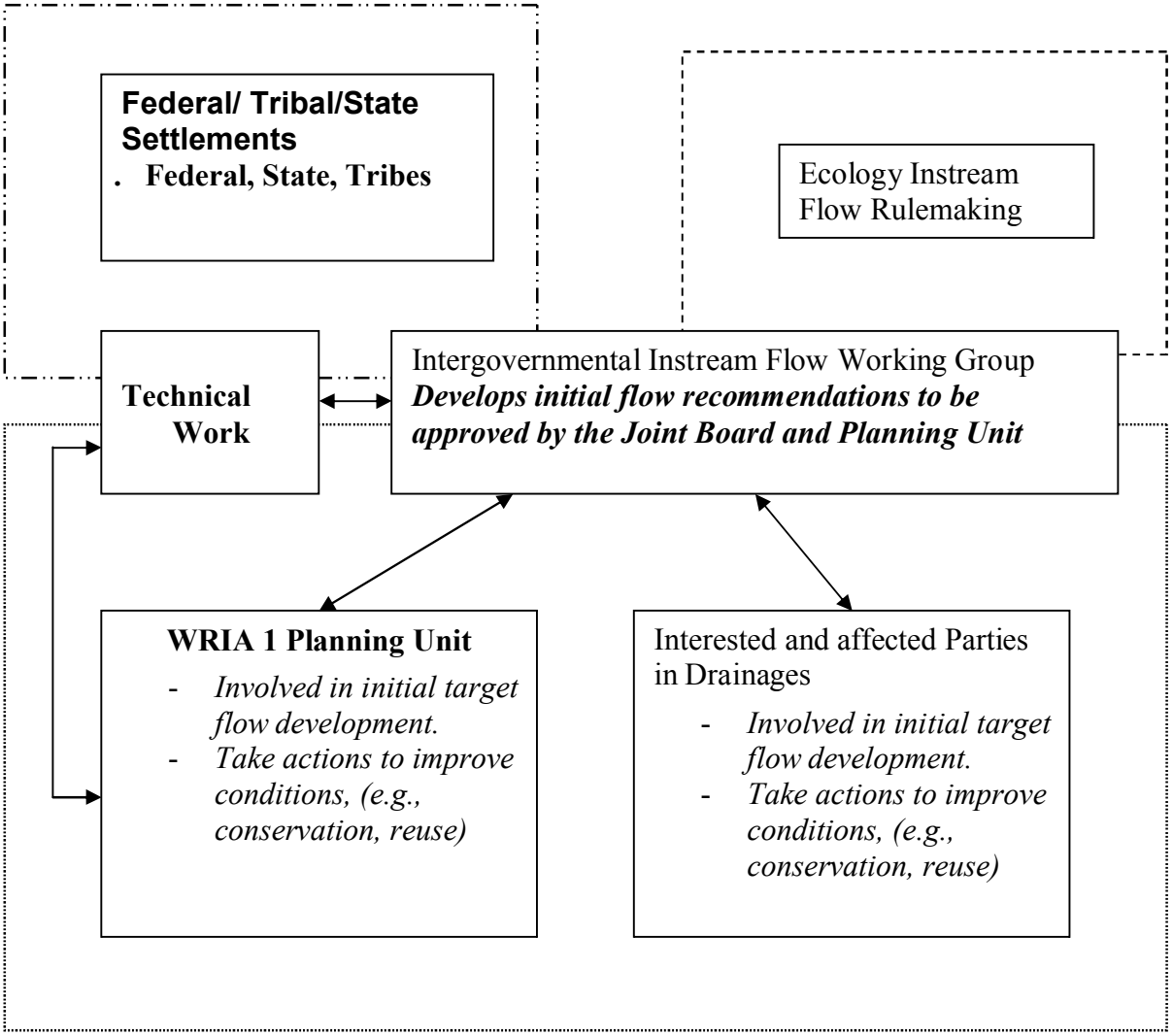
VI. Recommended Instream Flow *Adoption* Plan

Following recommendation on the drainage unit level and integration of flows for all drainages in the stream systems, the Joint Board and Planning Unit will approve the flow recommendations. To the extent necessary the boards, commissions and councils of the local governments will have an opportunity to approve flows that affect their jurisdiction. As part of the WRIA 1 Plan approval the lead agency will hold public hearings prior to adoption by the County Council of the recommended flows.

Following the above adoption the regulatory instream flow adoption process will utilizes the flows recommended by the IIFWG and approved by the Joint Board and Planning Unit. The locally approved regulatory portion of the flows is the basis for two formal adoption processes which *take place outside the WRIA 1 Project*. The two adoption processes are state rulemaking conducted by Ecology and a Federal/Tribal/State settlement process as requested by the Tribes and State (pending policy review) to resolve water and other claims with the Federal government. Parties involved in the Federal/Tribal/State settlement process will be asked to agree to take the locally approved flows into the process for acceptance or rejection. If the Federal/Tribal/State settlement process rejects the flows, the flows would iterate back to the IIFWG and the local process for review and approval. If the local process were to declare an impasse the decision would default to the Federal/Tribal/State settlement process. Ecology's rulemaking is a defined process with public input and review and if Ecology receives additional information during these hearings that lead to changes to the recommended flows, the IIFWG will be asked to review any proposed changes to the recommended flows.

The chart below illustrates the participants in the adoption processes. The chart also shows how the rulemaking process occurs and the Federal/Tribal/State settlement process occurs "outside" the WRIA 1 Project, but with overlap occurring in the form of the IIFWG.

ISF Action Plan Adoption Process Flow Chart



.....	= WRIA 1 Project RCW 90.82 Process
– · –	= Settlement Negotiation Process
- - - -	= State Rule Making Process

Federal/Tribal/State settlement process

Outside the WRIA 1 Project, a negotiated Federal/Tribal/State settlement is reached through the multiple step negotiated process described in the document *Federal Reserved Water Rights-The Negotiated Settlement Option* (IIFWG, November 5, 2003) found in Appendix II. The steps in the negotiated settlement flow chart are: 1) preparation, decide who participates; 2) reach local agreement (this process' step 2 includes flow selection, Joint Board and Planning Unit flow approval, and rule making); 3) final authorization by state and local parties; 4) federal review and approval; 5) tribal referendum; 6) federal approval; 7) funding the settlement 8) implementation of settlement including consent decree. (The negotiated settlement is filed as a legal action requesting a consent decree in federal court.)

If successful the negotiated settlement option will resolve tribal claims and may bring federal money to the WRIA, and could result in senior tribal rights to instream flows for fish and water consistent with the 1855 Treaty of Point Elliot. It is also possible that federal and state legislation may be needed to execute the terms of a settlement agreement and this legislative action may affect the timing of any judicial action.

State Rule Making

After local agreements are reached on flows, state rule making may also be required to modify the current Chapter173-501 WAC on flows and to trigger implementation actions by State agencies. State rule making provides for representation, public education and involvement, and public hearings and will be an opportunity for anyone who chose not to participate earlier to be heard. However, state rule making alone will not resolve tribal claims and will not result in certainty or finality. (See definition of priority date in Definition of Terms, Appendix I.)

Under RCW 90.82.040, if there is no Planning Unit agreement on approval of flow recommendations within four years of when funds were first received, Ecology *may* initiate rule making and has two years to set flows. Section 080 of Chapter 90.82 RCW describes the rule making process after the Planning Unit makes recommendations on flows. When Ecology proposes an instream flow rule negotiated by a Planning Unit, it is obligated to follow the State Administrative Procedure Act (APA)(Chapter 34.05 RCW). If the planning effort was sufficiently broad and thorough, it most likely will be complete, consistent with legal requirements, and have captured or considered most all of the views in the flow deliberations. However, if during the APA review process, concerns are identified that the State concludes may require a substantive change to the flow recommendation, the State will refer the flow recommendations/proposed rule back to the instream flow selection group for further consideration. The State reserves its statutory authority to proceed with rulemaking if, in its judgment, an amended flow recommendation acceptable to the State is not timely developed.

VII. Recommended Instream Flow *Enforcement* Plan

Compliance and enforcement issues will be identified, discussed, and recommended in the drainage unit level discussions. At some point in this process the IIFWG will recommend to the Joint Board and Planning Unit modifications to the Plans compliance and enforcement sections for implementation by the WRIA 1 Project. It is currently recommended that the plan for compliance with instream flows contain the four elements outlined in the WRIA Wide Compliance Program and be consistent throughout the WRIA:

- Education
- Technical Assistance
- Formal Enforcement
- Compliance Monitoring

Therefore, enforcement will begin as an information sharing effort during workshops with affected parties in the drainages. Technical assistance will include discussion with affected parties of options such as flow contracts, submitting water right change applications to resolve some compliance problems if possible, and other compliance strategies. After target flows are approved by the Joint Board and Planning Unit and water users have evaluated the flow contract option, enforcement against unpermitted water users without flow contracts should begin. The local negotiation process will define how enforcement will be conducted and identify the appropriate authorities for implementation. At some point in the process formal adjudication of existing claims, permits and certificates will be required to determine their official extent. This step will also create a legal forum to determine the extent of their rights for holders of claims, permits or certificates who have chosen not to participate in the instream flow negotiation process.

VIII. Recommended Instream Flow *Implementation and Funding* Plan

This Action Plan is intended to be an integral part of the WRIA 1 Project. A number of the outcomes from this Action Plan will feed into other WRIA 1 programs. The flow recommendations clearly will be used in a number of areas. It is also the intent of this Action Plan that the need for compliance and enforcement be taken up as part of the ongoing WRIA 1 Project with input from this Action Plan.

The reverse is also true in that for this Action Plan to achieve the goals set forth, WRIA 1 work on ground water will be required. The interaction of ground and surface water and the way in which ground water supports instream flows is critical to managing instream flows especially during low flow periods. Also understanding the storage potential and release timing issues of the ground water aquifers is important when considering how to store more water for both instream and out of stream uses. The ground water work will move forward in concert with this ISF Action Plan.

The interrelatedness of water quantity, water quality, instream flow and fish habitat makes the funding support for the entire WRIA 1 Project an important single package. The costs should be looked at in aggregate and adjusted as a collective to facilitate being able to move forward in a cooperative collective fashion.

The value of the WRIA 1 Project is its cooperative nature and being able to maintain that aspect is important since it will enable the WRIA 1 Project participants to attract significant Federal and State grant funding. An important aspect of bringing in a Federal team to engage in the proposed Federal/Tribal/State settlement process is that it is the only way that finality and certainty goals can be achieved and the solution to tribal claims under these settlement processes usually involves Federal funding of large projects to resolve the claims. Everyone benefits and the funding is potentially greater if there is a cooperative local negotiation aspect to support the settlement process. The alternative to the current cooperative process is significantly more adversarial. The history of disputes in the western U.S. over water is one of significant litigation and costly court battles. The current WRIA 1 Project is on a path to substantially avoid costly litigation and court battles.

However, political will is required to financially support the process and maintain a long-term vision for a cooperative future. Staff will be presenting a funding package for the WRIA 1 Project including this Action Plan in the near future along with the first draft of the WRIA 1 Plan.

In the meantime it is the hope of staff that everyone can focus on the details of this Action Plan and understand and appreciate the linkages with other aspects of watershed management under the WRIA 1 Project.

APPENDIX I– Definition of Terms

Achieving Flow Settings - The process of ensuring that there is sufficient water in streams to satisfy the instream flow requirements adopted by rule-making and/or other processes.

Adaptive management - A process whereby management decisions can be changed or adjusted based on additional biological, physical, or socioeconomic information. In the context of instream flow, adaptive management can result in higher or lower instream flow requirements.

Adjudicated certificate - A document issued pursuant to RCW 90.03.240 to evidence a water right adjudicated under the terms of an adjudication through a Superior Court.

Adjudication - A general adjudication of water rights determines the validity and extent of existing water rights in a specific geographic area. An adjudication is a legal process, generally conducted through the superior court in the county in which the water is located. An adjudication does not create new rights, it only confirms existing rights.

Adopting Flow Settings - The process of finalizing instream flow requirements by establishing instream flows as water rights with a specific priority date.

Affected Parties- The property owners, water right document holders (certificate, permit, application, claim), the PU Caucuses, the Nooksack Indian Tribe, and the Lummi Nation.

Appropriation of water - The process of legally acquiring the right to specific amounts of public water through application of the water to beneficial use.

Aquifer - A geologic formation that contains water.

Availability - Water that is not only physically available, but which has not been previously appropriated by anther person or which is not required to satisfy instream flows (see physical water availability).

Base Flow - Streamflow originating entirely from ground water discharging to the stream. Also used to refer to a level of streamflow established in accordance with provisions of Chapter 90.54 RCW required in perennial streams to preserve wildlife, fish, scenic, aesthetic, and other environmental and navigational values. WAC 173-500-050 (3)

Basin - A region in which rainfall or snowmelt water will flow toward a single point. Thus, it is any hollow or trough in the earth's crust, whether filled by water or not. A basin is the total area drained by a river and its tributaries. Used interchangeably with watershed.

Beneficial use - (1) the use of water for domestic, stock watering, industrial, commercial, agricultural, irrigation, hydroelectric power production, mining, fish and wildlife maintenance and enhancement, shell fish and other aquatic life, navigation, recreation, thermal power production, preservation of environmental and aesthetic values, and all other uses compatible with the enjoyment of the public waters of the state, or (2) the measure of a water right based on the amount of water applied in a reasonable manner without waste.

Certificate - A document issued pursuant to Chapters 90.03 or 90.44 RCW to evidence a water right perfected under the terms of the water right permit.

Change Application - The standard form, which when completed and filed with Ecology, is the first step toward changing a water right.

Channel-maintenance flow - (1) The minimum streamflow to sustain biota; (2) range of flows within a stream from normal to peak runoff and may include, but is not limited to, flushing flows or flows required to maintain the existing natural stream channel and adjacent riparian vegetation.

Clean Water Act - Growing public awareness and concern for controlling water pollution led to enactment of the Federal Water Pollution Control Act Amendments of 1972. As amended in 1977, this law became commonly known as the Clean Water Act. The Act established the basic structure for regulating discharges of pollutants into the waters of the United States. It gave EPA the authority to implement pollution control programs such as setting wastewater standards for industry. The Clean Water Act also contained requirements to set water quality standards for all contaminants in surface waters. The Act made it unlawful for any person to discharge most pollutants from a point source into navigable waters, unless a permit was obtained under its provisions and recognized the need for planning to address the critical problems posed by non-point source pollution.

Consent Decree - A contract of the parties entered upon the record with the approval and sanction of a court of competent jurisdiction, which cannot be nullified or set aside without the consent of the parties thereto, except for fraud or mistake. Has the same force and effect as any other judgment. Because the agreement of the parties waives exception to irregularities in the proceedings occurring prior to the time of agreement, appeal from a consent decree/consent judgment is limited to attack for mistake, fraud, or lack of jurisdiction.

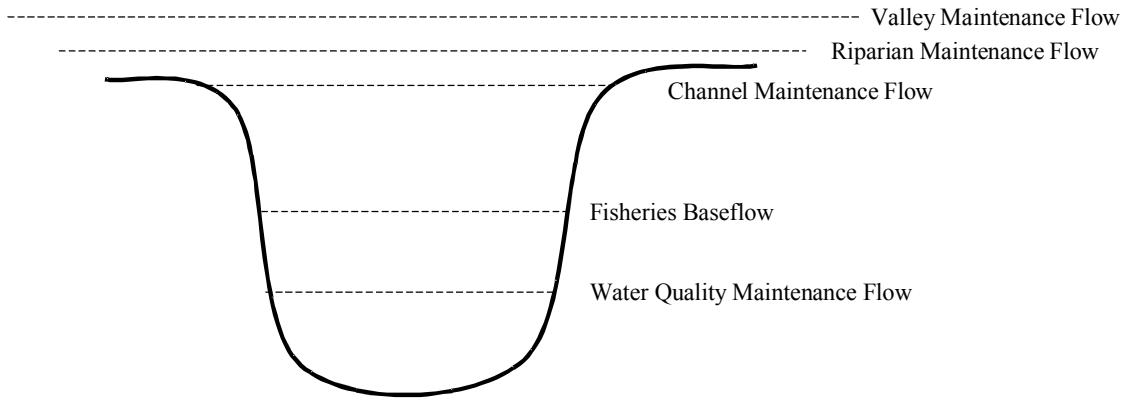
Diversion - (1) a physical structure constructed to take surface water from its natural course into a canal, pipe or other conduit by means or gravity flow or by pumping, or (2) the action of taking water from a stream or other body of water.

Ecological Flow Regime - instream flow levels needed to preserve, protect, and restore the physical, biological, and chemical aspects of a stream. As shown in Figure 5, can be divided into five functional categories: 1) water quality maintenance, 2) fisheries baseflow, 3) channel maintenance, 4) riparian maintenance, and 5) valley maintenance. Each of these flows components were identified by the September 1999 conference (Hardy 2000) participants as essential for maintaining the ecological health of the stream system. Please note this is a diagrammatic representation and does not represent an absolute relationship between the flows identified (i.e., water quality maintenance flow may or may not be less than the fisheries baseflow).

Briefly, the water quality maintenance flow is the quantity of water needed to assimilate wastewater and still achieve compliance with applicable water quality standards. The fish habitat maintenance flow is the minimum instream flow needed to support fish populations during different life stages. The channel maintenance flow is the minimum amount of water needed to perform processes such as sediment transport. The channel maintenance flows impact the long-term characteristics of aquatic habitat such as the distribution, quantity, and quality of pools and riffles. Riparian maintenance flows are the flows needed to maintain a productive plant and animal community

along the stream corridor. Valley maintenance flows are catastrophic flood events and are generally not quantified.

Figure 5. Hypothetical illustration of the flow components essential for maintaining the ecological health of the stream system



Request to change the term "Fisheries Baseflow" in Figure 5 above changed to "Fish Habitat Maintenance Flow".

Ecology - The department of ecology.

Endangered Species Act - The 1993 Endangered Species Act requires that all Federal agencies undertake programs for the conservation of endangered and threatened species, and are prohibited from authorizing, funding, or carrying out any action that would jeopardize a listed species or destroy or modify its "critical habitat" [section 7].

– Flow, Optimum - That instantaneous discharge which provides the best set of hydraulic conditions for a selected life history stage, species, or fishery. (Bahya 1979)

General adjudication of water rights - A Washington State Superior Court legal proceeding initiated by the department of ecology as plaintiff to determine the validity, priority and extent of existing water rights in a given geographic area or watershed. An adjudication is a form of a quiet title action.

Ground water - All waters that exists beneath the land surface or beneath the bed of any stream, lake, or reservoir, or other body of surface water within the boundaries of Washington State, whatever may be the geological formation or structure in which such water stands or flows, percolates or otherwise moves.

Hydraulic continuity – The natural interconnection of ground water and surface water bodies. An aquifer is in hydraulic continuity with wetlands, lakes, streams, rivers or other surface water bodies if it discharges, recharges, or otherwise affects the surface water bodies.

Instream - Within the natural stream channel.

Instream flow - The level of flow determined by the department to be necessary to protect instream resources. RCW 90.03.345 states that "the establishment of . . . minimum flows or levels under

RCW 90.22.010 or 90.54.040 shall constitute appropriations with in the meaning of this chapter with priority dates as of the effectives dates of their establishment." (i.e. they are water rights) [parenthetical material added]

Instream Flow Requirement - Instream flow is the amount of water flowing through a natural stream course that is needed to sustain the instream values at an acceptable level. Instream values and uses include protection of fish and wildlife habitat, migration, and propagation; outdoor recreation activities; navigation; hydropower generation; waste assimilation (water quality); and ecosystem maintenance which includes recruitment of fresh water to the estuaries, riparian vegetation, floodplain wetlands, and maintenance of channel geomorphology. Water requirements sufficient to maintain all of these uses at an acceptable level are the "instream flow requirements." (USFWS 1993)

Instream Values - defined by law (RCW 90.54.020(3)(a)) as fish, wildlife, recreation, aesthetics, navigation, water quality, and other environmental values subject to protection through establishment of minimum instream flows.

Instream Resources - Resources, values, or activities, such as fish, other organisms, navigation, recreation, hydropower, and water quality, which require water in the stream channel.

Low flow - Flow level limitations appearing as provisions on permits and certificates issued by the department or its predecessors.

Minimum Instream Flow - streamflows established by administrative rule or other means for the purpose of protecting and preserving instream values. Flows adopted by rule are considered a water right with a priority date as of the date of their adoption. Also called "instream flows" and "base flows" in Washington statutes, and generally referred to as "instream flows".

Mitigation - A wide variety of measures (such as siting, facility design, operation, and retrofit) which the department determines are defensible, technically feasible, and environmentally sound that are taken to diminish the impact of an action. It may include, but is not limited to not implementing the decision, taking affirmative steps to avoid the impact, rectifying through restoration or compensating by replacing or providing substitute resources; changes in siting, facility design or operation; retrofitting; transfer or protection of equivalent resources.

Permit - A document issued by the department pursuant to Chapter 90.03 or 90.44 RCW in response to a report of examination that conveys authority to appropriate water and construct physical works associated with the appropriation. To the extent water is not put to use, a permit is an inchoate water right.

Prior Appropriation Doctrine - the system for allocating water to private individuals and public institutions used in most Western states, *including Washington*. The prior appropriation doctrine is based on the concept of "First in Time, First in Right." The first person to take a quantity of water and put it to "Beneficial Use" has a higher priority of right than a subsequent user. Under drought conditions, higher priority users are satisfied before junior users receive water. Appropriative rights awarded under state water law can be lost through nonuse (i.e., "use it or lose it") in a formal process known as relinquishment; they can also be sold or transferred apart from the land. In contrast, federal reserved water rights and tribal reserved water rights are not subject to relinquishment due to nonuse (Winans citation).

Priority - Priority determines the order of rank of the rights to use water in a system. Under the Prior Appropriation Doctrine, priority is the concept that the person first using water for a beneficial purpose has a right superior to those commencing their use later. The priority date of a Federal reserved water right is the date the land is withdrawn from the public domain. Priority is important when the quantity of available water is insufficient to meet the needs of all those having rights to use water from a common source. Under the prior appropriation system, shortages are not shared. Some Western State statutes contain priority or preference categories of water use, under which higher priority uses (such as domestic) have first right to water in times of shortage, regardless of priority date. There may also be constraints against changes or transfers involving these priority uses. (USFWS 1993)

Recharge of ground water - The processes by which surface water percolates below the rooting zone of soil and reaches the saturated zone in an aquifer.

Regulatory Flow -

Reserved Water Rights - This class of water rights is a judicial creation derived from Winters v. United States (207 U.S. 564, 1907) and a subsequent federal case law, which collectively hold that when the federal government withdraws land from general use and reserves it for a specific purpose, the federal government by implication reserves the minimum amount of water unappropriated at the time the land was withdrawn or reserved to accomplish the primary purposes of the reservation. Federal reserved water rights may be claimed when Congress has by statute withdrawn lands from the public domain for a particular federal purpose or where the President has withdrawn lands from the public domain for a particular federal purpose pursuant to congressional authorization. (National Research Council 1992)

Rulemaking - The process, articulated by the Administrative Procedures Act (see Chapter 34.05 RCW), whereby Washington State government agencies adopt regulations as part of the Washington Administrative Code (WAC) in order to implement the statutes embodied in the Revised Code of Washington (RCW).

Senior water right - Any water right with a priority date earlier than the water right under consideration.

Surface water - (1) a body of water such as a stream, a lake, or spring at or on the land surface, or (2) water flowing in or overland to a stream or present in a lake, pond, or wetland.

Target Flow - Federal agencies use the term target flow in referring to an amount of water in a stream to meet fish needs. Under the Endangered Species Act (ESA), the National Marine Fisheries Service and the US Fish and Wildlife Service use target flows as their goal to provide adequate flows for ESA-listed fish. A target flow is to be biologically-based, achieveable, and would provide sufficient water for properly functioning habitat.

Time Immemorial - A priority date under the Appropriation Doctrine of time 0000, essentially making such water rights the most senior right possible**.**

Treaty Reserved Right/Treaty Rights - Rights of Indian Tribes that were confirmed in the Stevens Treaties. These rights have also been affirmed by judicial decisions. These rights include the right of Tribal members to harvest fish resources throughout their usual and accustomed fishing

areas. Several U.S. Supreme Court Decisions have also recognized that any rights not specifically given up in the treaties are rights retained by the Tribes.

Vested water right -A right to use surface water established prior to the effective date of chapter 90.03 RCW or to use ground water prior to the effective date of the 1945 ground water code (chapter 90.44 RCW).

Water Resource Inventory Area or (WRIA) - One of 62 geographic areas of the state based generally on drainage patterns and demarcated on the map in WAC 173-500-990.

Water right - A legal right to make beneficial use of public waters of the State of Washington.

Water Right Application - The standard form which is filed with Ecology to request that a permit be issued for the use of water, and is the first step toward establishing a water right.

Water right claim - A claim to a vested right to withdraw or divert and make beneficial use of public surface or ground waters of the state, filed on a form provided by the department and registered in accordance with Chapter 90.14 RCW.

Well - Any excavation that is drilled, cored, bored, washed, driven, dug, jetted, or otherwise constructed when the intended use of the excavation is for the location, diversion, artificial recharge, or withdrawal of ground water. Well includes water-supply well and resource protection well. Well does not mean excavations excluded in Chapter 173-160-WAC.

Withdrawal - (1) the physical structures constructed to take ground water from an aquifer into a pipe or other conduit by means of gravity flow or by pumping, or (2) the action of removing ground water from an aquifer.

Appendix II

Federal Reserved Water Rights- The Negotiated Settlement Option (IIFWG, 2003)